CHAPTER 128D
PART I. ENVIRONMENTAL RESPONSE LAW

SECTION

128D-1 Definitions
128D-2 Environmental response revolving fund
128D-2.5 Toxicologists
128D-3 Reportable quantities; duty to report
128D-4 State response authorities; uses of fund
128D-5 Recovery of costs
128D-6 Liability
128D-6.5 Limitation of Liability for heavy fuel oil releases
128D-7 State contingency plan; rules
128D-8 Civil penalties
128D-9 Injunctive relief
128D-10 Knowing releases
128D-11 Record keeping requirements
128D-12 Confidentiality of information
128D-13 Reporting requirements
128D-14 Public participation
128D-15 Employee protection
128D-16 Repealed
128D-17 Judicial review
128D-18 Apportionment and contribution
128D-19 Administrative review of orders
128D-20 De minimis settlements
128D-21 Citizen's suits
128D-22 Exemption from duplicative regulation
128D-23 Exemption from state and county permits

PART II. VOLUNTARY RESPONSE PROGRAM

SECTION

128D-31 General
128D-32 Definitions
128D-33 Eligibility
128D-34 Application
128D-35 Denial of application
128D-36 Funding
128D-37 Oversight costs
128D-38 Exempt positions
128D-39 Letter of completion
128D-40 Exemption from liability
128D-41 Termination of voluntary response action

Note

Chapter title amended by L 1990, c 298, pt of §18.

Law Journals and Reviews

Liability Insurance Coverage for Pollution Claims. 12 UH L. Rev. 83. An Analysis of Hawaii's Superfund Bill, 1990. 13 UH L. Rev. 301.

"PART I. HAWAII ENVIRONMENTAL RESPONSE LAW."

§**128D-1 Definitions.** As used in this chapter, unless the context otherwise requires:

"CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, P.L. 96-510 (42 U.S.C. §§9601-9675), as amended.

"Clean Water Act" means the Federal Water Pollution Control Act of 1972, P.L. 92-500 (33 U.S.C. §§1251-1387), as amended.

"Contractual relationship" means relationships involving land contracts, deeds or other instruments transferring title or possession.

"Department" means the department of health.

"Director" means the director of health.

"Environment" means any waters, including surface water, ground water, or drinking water supply, any land surface or any subsurface strata, or any ambient air within the State of Hawaii or under the jurisdiction of the State.

"Facility" means any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or any site or area where a hazardous substance or pollutant or contaminant has been deposited, stored, disposed of, or placed, or otherwise comes to be located; but does not include any consumer product in consumer use.

“Federal on-scene coordinator” means the federal official predesignated by the United States Environmental Protection Agency or the United States Coast Guard to coordinate and direct federal responses under subpart D, or the official designated by the lead agency to coordinate and direct removal under subpart E, of the National Contingency Plan.

"Fund" means the environmental response revolving fund.

"Hazardous substance" includes any substance designated pursuant to section 311(b)(2)(A) of the Clean Water Act; any element, compound, mixture, solution, or substance designated pursuant to section 102 of CERCLA; any hazardous waste having the characteristics identified under or listed pursuant to §3001 of the Solid Waste Disposal Act; any toxic pollutant listed under section 307(a) of the Clean Water Act; any hazardous air pollutant listed under section 112 of the Clean Air Act, as amended (42 U.S.C. §§7401-7626); any imminently hazardous chemical substance or mixture regulated under section 7 of the Toxic Substances Control Act, as amended (15 U.S.C. §§2601-2671), oil, trichloropropane, and any other substance or pollutant or contaminant designated by rules adopted pursuant to this chapter.

In adopting rules, the director shall consider any substance or mixture of substances, including but not limited to feedstock materials, products, or wastes, which, because of their quantity, concentration, or physical, chemical, or infectious characteristics, may:

(1) Cause or significantly contribute to an increase in serious irreversible or incapacitating reversible illness; or

(2) Pose a substantial present or potential hazard to human health, to property, or to the environment when improperly stored, transported, released, or otherwise managed.

"National contingency plan" means the national contingency plan published under section 311(c) of the Clean Water Act or revised pursuant to section 105 of CERCLA.

"Natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the State of Hawaii, any county, or by the United States to the extent that the latter are subject to state law.

"Oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, oil mixed with wastes, crude oil or any fraction or residue.

"Owner" or "operator" means:

(l) In the case of a vessel, any person owning, operating, or chartering by demise the vessel;

(2) In the case of an onshore facility or an offshore facility, any person owning or operating the facility, and;

(3) In the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of a state or local government, any person who owned, operated, or otherwise controlled activities at the facility immediately beforehand.

"Owner" or "operator" does not include a person who, without participating in the management of the vessel or facility, holds indicia of ownership primarily to protect its security interest in the vessel or facility. Until such time as the department adopts rules pertaining to lenders, the provisions of the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996 shall apply to the actions of lenders after July 1, 1997." [am L 1997, c 377, §4]

"Person" means any individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, state, county, commission, political subdivision of the State, or, to the extent they are subject to this chapter, the United States or any interstate body.

"Pollutant or contaminant" means any element, substance, compound, or mixture, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

"Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of any hazardous substance or pollutant or contaminant into the environment, (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant); but excludes:

(1) Any release which results in exposure of persons solely within a workplace, with respect to a claim which such exposed persons may assert against their employer;

(2) Emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine;

(3) Release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 (42 U.S.C. §2011), if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under 42 U.S.C. §2210;

(4) Any release resulting from the normal application of fertilizer;

(5) Any release resulting from the legal application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act;

(6) Releases from sewerage systems collecting and conducting primarily domestic wastewater; or

(7) Any release permitted by any federal, state, or county permit or other legal authority.

"Remedy" or "remedial action" means those actions consistent with permanent correction taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance or pollutant or contaminant into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

(1) The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or pollutants or contaminants or associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health or welfare or the environment.

(2) The term includes the costs of permanent relocation of residents and businesses and community facilities where the director determines that, alone or in combination with other measures, such relocation is more cost- effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances or pollutants or contaminants, or may otherwise be necessary to protect the public health or welfare.

(3) The term does not include the offsite transport of hazardous substances or pollutants or contaminants, or the storage, treatment, destruction, or secure disposition offsite of such hazardous substances or pollutants or contaminants or contaminated materials unless the director determines that such actions: are more cost-effective than other remedial actions; will create new capacity to manage hazardous substances in addition to those located at the affected facility; or are necessary to protect public health or welfare or the environment from a present or potential risk which may be created by further exposure to the continued presence of such hazardous substances or pollutants or contaminants.

"Remove" or "removal action" means the cleanup of released hazardous substances or pollutants or contaminants from the environment, such actions as may be necessary to take in the event of the threat of release of hazardous substances or pollutants or contaminants into the environment, such actions as may be necessary to

monitor, assess, and evaluate the release or threat of release of hazardous substances or pollutants or contaminants, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, and any emergency assistance.

"Respond" or "response" means remove, removal, remedy, or remedial action; and all such terms include government enforcement activities related thereto.

"SARA" means the Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499.

"Vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water. [L 1988, c 148, pt of §2; am L 1990, c 298, pt of §18; am L 1991, c 280, §2; am L 1993, c 324, §1]

§**128D-2 Environmental response revolving fund: uses.** (a) There is created within the state treasury an environmental response revolving fund, which shall consist of moneys appropriated to the fund by the legislature, moneys paid to the fund as a result of departmental compliance proceedings, moneys paid to the fund pursuant to court-ordered awards or judgments, moneys paid to the fund in court-approved or out-of-court settlements, all interest attributable to investment of money deposited in the fund, moneys generated by the environmental response tax established in section 243-3.5, and moneys allotted to the fund from other sources; provided that when the total balance of the fund exceeds $20,000,000, the department of health shall notify the department of taxation of this fact in writing within ten days. The department of taxation then shall notify all distributors liable for collecting the tax imposed by section 243-3.5 of this fact in writing, and the imposition of the tax shall be discontinued beginning the first day of the second month following the month in which notice is given to the department of taxation. If the total balance of the fund thereafter declines to less than $3,000,000, the department of health shall notify the department of taxation which then shall notify all distributors liable for collecting the tax imposed by section 243-3.5 of this fact in writing, and the imposition of the tax shall be reinstated beginning the first day of the second month following the month in which notice is given to the department of taxation.

(b) Moneys from the fund shall be expended by the department for response actions and preparedness, including removal and remedial actions, consistent with this chapter; provided that the revenues generated by the "environmental response tax" and deposited into the environmental response revolving fund:

(1) Shall also be used:
  (A) For oil spill planning, prevention, preparedness, education, research, training, removal, and remediation; and
  (B) For direct support for county used oil recycling programs; and
(2) May also be used to address concerns related to drinking water, underground storage tanks, including support for the underground storage tank program of the department and funding for the acquisition by the State of a soil remediation site and facility. [L 1988, c 148, pt of §2; am L 1990, c 298, pt of §18; am L 1991, c 157, §8 and c 280, §3; am L 1992, c 259, §2; am L 1993, c 300, §4; am L 1994, c 205, §1; L 1997, c 260, §2]

Cross References

Raising the legislative ceiling of the fund, see §128D-4(e).

§128D-2.5 Toxicologists. (a) The department may establish permanent exempt positions known as toxicologists for the purpose of assessing human health risk. The positions shall be appointed by the director without regard to chapter 76 and 77. The fund for these positions shall come from the environmental response revolving fund established in section 128D-2. [L 1997, c 146, §2]

§**128D-3 Reportable quantities; duty to report.** (a) The director shall adopt rules pursuant to chapter 91 establishing the quantities of designated hazardous substances, and specifying the periods of time within which such quantities, when released, are reportable pursuant to this chapter. The director, at a minimum, shall adopt hazardous substances and reportable quantities as designated by the United States Environmental Protection Agency pursuant to parts 117 and 302 of Title 40 of the Code of Federal Regulations, and by the United States Department of Transportation pursuant to parts 171 and 172 of Title 49 of the Code of Federal Regulations. The designated quantity released of any hazardous substance shall be a reportable quantity, regardless of the medium into which the hazardous substance is released.

(b) Any person in charge of a vessel or an offshore or onshore facility shall immediately notify the department as soon as the person has any knowledge of any release (other than a federal or state permitted release) of a hazardous substance from the vessel or facility in quantities equal to or greater than those determined pursuant to section 102 of CERCLA or rules adopted pursuant to this chapter. Releases which occurred prior to July 1, 1990, are excluded from this requirement. Unless the director requires otherwise by rule, the regulations adopted under section 103(b) of CERCLA shall apply to the implementation of this section.

(c) Any person who fails to report a hazardous substance release to the department immediately upon knowledge of the release shall be subject to a civil penalty in an amount not to exceed $10,000 for each day of failure to report or subject to prosecution for a criminal misdemeanor. Notification received by the department pursuant to this section or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except for a prosecution for perjury or for giving a false statement; or a violation of section 128D-10. [L 1988, c 148, pt of §2; am L 1990, c 298, pt of §18; am L 1991, c 280, §4]

§**128D-4 State response authorities; uses of fund.** (a) Whenever any hazardous substance is released or there is a substantial threat of such a release into the environment, or there is a release or substantial threat of such release into the environment of any pollutant or contaminant that may present a substantial danger to the public health, welfare, or the environment, the director is authorized to act, consistent with the state contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time, including its removal from any contaminated natural resources, or take any other response measure consistent with the state contingency

plan which the director deems necessary to protect the public health or welfare or the environment. The director may:

(1) Issue an administrative order or conduct any other enforcement or compliance activities necessary to compel any known responsible party or parties to take appropriate removal or remedial action necessary to protect the public health and safety and the environment;

(2) Upon determining that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance, issue without a hearing, such orders as may be necessary to protect the public health, welfare, and the environment;

(3) Solicit the cooperation of responsible parties prior to issuing an order to encourage voluntary cleanup efforts; and, if necessary, negotiate enforcement agreements with responsible parties to conduct needed response actions according to deadlines established in compliance orders or settlement agreements;

(4) Undertake those investigations, monitoring, surveys, testing, sampling, and other information gathering necessary to identify the existence, source, nature, and extent of the hazardous substances or pollutants or contaminants involved and the extent of danger to the public health or welfare or to the environment;

(5) Perform any necessary removal or remedial actions so as to abate any immediate danger to the public health or welfare or to the environment; and

(6) Contract the services of appropriate organizations to perform the actions set forth in paragraphs (1), (2), (3), (4), and (5).

(b) For the purposes of determining or investigating an actual release or a suspected release, or choosing or taking any response action, or conducting any study, or enforcing this chapter, any person who has or may have information relevant to any of the following, upon the reasonable and necessary request of any duly authorized representative of the department, shall furnish information or documents in the person's possession relating to such matter:

(1) The identification, nature, and quantity of hazardous substances or pollutants or contaminants which have been or are generated, treated, or stored or disposed of at a facility or vessel or transported to a facility or vessel.

(2) The nature and extent of a release or threatened release of a hazardous substance or pollutant or contaminant from a facility or vessel.

(3) Information relating to the ability of a person to pay for or perform the cleanup.

In addition, upon reasonable notice, such person shall grant any such authorized representative of the department access at all reasonable times to any facility, vessel, establishment, site, place, property, or location to inspect same and to review and copy all documents or records relating to such matters or shall copy and furnish the officer, employee, or representative of the department all such documents or records, at the option and expense of such person.

(c) Moneys in the fund may be expended by the director for any of the following purposes:

(1) Payment of all costs of removal or remedial actions incurred by the State or the counties in response to a release or threatened release of a hazardous substance or pollutant or contaminant; or

(2) Payment for the State's share of a removal or remedial action pursuant to section 104(c)(3) of CERCLA;

(3) Payment of all costs incurred by the State in the restoration, rehabilitation, or replacement or acquisition of the equivalent of any natural resources injured, destroyed, or lost as a result of a release of a hazardous substance or pollutant or contaminant;

(4) Payment of all costs of response action for a release due to the legal application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act; or

(5) Payment of all costs or remedial action for any release permitted by any federal, state or local permit or other legal authority.

(d) No response actions taken pursuant to this chapter by the department shall duplicate federal response actions.

(e) The governor may raise the legislative ceiling established in the environmental response revolving fund if, in the governor's determination sufficient funds do not exist within the ceiling to conduct emergency response actions pursuant to this chapter." [L 1988, c 148, pt of §2; am L 1990, c 298, pt of §18; am L 1991, c 280, §5]; am L 1997, c 260, §3]

§**128D-5 Recovery of costs.** (a) Except for costs incurred in responding to a release or threatened release of any pollutant or contaminant and except for costs incurred in accordance with section 128D-4(c)(4), and (5), and except for costs incurred in accordance with section 128D-4(c)(3) for natural resources damage occurring wholly prior to July 1990, any costs incurred and payable from the fund shall be recovered by the attorney general, upon the request of the department, from the liable person or persons. The amount of any costs which may be recovered pursuant to this section for a remedial or removal action paid from the fund shall include the amount paid from the fund and legal interest.

(b) Moneys recovered by the attorney general pursuant to this section shall be deposited into the account of the fund.

(c) Any action for recovery of response costs referred to in section 128D-6(a)(4)(A) and (c) must be commenced within six years after the date of completion of all response actions.

(d) Any action for recovery of natural resource damages referred to in section 128D-6(a)(4)(B) must be commenced within three years after the later of the following: (1) the date of the discovery of the loss and its connection with the release in question; or (2) the date on which the final regulations are promulgated under section 301(c) of CERCLA. [L 1988, c 148, pt of §2; am L 1990, c 298, pt of §18; am L 1991, c 280, §6]

§**128D-6 Liability.** (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (c):

(1) The owner or operator or both of a facility or vessel;

(2) Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;

(3) Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or on any vessel owned or operated by another party or entity and containing such hazardous substances; and

(4) Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release, which causes the incurrence of response costs of a hazardous substance;

shall be strictly liable for (A) all costs of removal or remedial actions incurred by the State or any other person; to the extent such costs and actions are consistent with this chapter, the state contingency plan, and any other state rules; (B) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such release; and (c) the costs of any health assessment or health effects study carried out consistent with this chapter, the state contingency plan, or any other state rules.

(b) The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (C). Such interest shall accrue from the later of (1) the date payment of a specified amount is demanded in writing, or (2) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the State's fund.

(c) There shall be no liability under subsection (a) for a defendant otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by:

(1) Any unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effect of which could not have been prevented or avoided by the exercise of due care or foresight;

(2) An act of war;

(3) An act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant, if the defendant establishes by a preponderance of the evidence that the defendant exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances; and the defendant took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) Any combination of the foregoing paragraphs.

(d) A defendant may also avoid liability under subsection (a) where the defendant is able to establish that the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility. In addition to establishing the foregoing, the defendant must establish that the defendant has satisfied the requirements of section

128D-6(c)(3) and one or more of the following circumstances described in paragraphs (1), (2), or (3) is also established by the defendant by a preponderance of the evidence:

(l) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed on, in, or at the facility;

(2) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation; or

(3) The defendant acquired the facility by inheritance or bequest.

To establish that the defendant had no reason to know, as provided in paragraph (1), the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

Nothing in this subsection or in section 128D-6(c)(3) shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this definition, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, the defendant shall be treated as liable under section 128D-6(a)(1) and no defense under section 128D-6(c)(3) shall be available to the defendant.

Nothing in this subsection shall affect the liability under this chapter of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the action relating to the facility.

(e) No person shall be liable under this chapter or otherwise under the laws of the State or any of the counties, including the common law to any government or private parties for costs, damages, or penalties as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with this chapter or at the direction of an on-scene coordinator, with respect to an incident creating a danger to public health or welfare or the environment as a result of any release of a hazardous substance or pollutant or contaminant or the threat thereof. This subsection shall not preclude liability for costs, damages, or penalties as the result of gross negligence or intentional misconduct on the part of such person.

(f) No county or local government shall be liable under this chapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance or pollutant or contaminant generated by or from a facility owned by another person. This subsection shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the county or local government.

(g) No indemnification, hold harmless, or similar agreement or conveyances shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person, the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section. Nothing in this chapter shall bar a cause of action that an owner or operator or any person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(h) In the case of an injury to, destruction of, or loss of natural resources under section 128D-6(a)(4)(B), liability shall be solely to the State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to the State. The natural resource trustee for the State shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the natural resource trustee under section 128D-6(a)(4)(B) shall not be limited by the sums which can be used to restore or replace such resources. Any damages recovered by the state attorney general for damages to natural resources shall be deposited in the fund and credited to a special account for the purposes provided above.

(I) Provided that no liability shall be imposed under this chapter, where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license. There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resources. Notwithstanding any other provision of this chapter, there shall be no recovery under this chapter for natural resource damages where such damages have occurred wholly before July 1, 1990.

(j) No person other than a government entity may recover costs or damages under this chapter arising from a release which occurred before July 1, 1990. [L 1988, c 148, pt of §2; am L 1990, c 298, pt of §18; am L 1991, c 280, §7; am L 1993, c 324, §2]

Note

L 1992, c 130, §1, effective until June 29, 1996, relating to liability for release of heavy fuel oil, provides in part:

"...liability of any person under section 128D-6, Hawaii Revised Statutes, for a release of a heavy fuel oil from a tank barge carrying heavy fuel oil inter-island, which release is subject to the federal Oil Pollution Act of 1990, and which tank barge can carry not more than 60,000 barrels of heavy fuel oil, shall not exceed $700,000,000. "Heavy fuel oil" means petroleum that is No. 6 technical grades of fuel oil, and other residual fuel oils such as Navy Special Fuel Oil and Bunker C. "Tank barge" means any vessel that carries oil in bulk as cargo or in residue and is not equipped with a means of self-propulsion."

Emergency rate action; interruption of fuel supply and approval for applications seeking relief. L 1992, c 130, §§3, 5.

§**128D-6.5 Limitation of liability for heavy fuel oil releases.** (a) Notwithstanding any law to the contrary, the liability of any person under section 128D-6 for any release of heavy fuel oil from a tank barge carrying heavy fuel oil inter-island shall not exceed $700,000,000.

(b) For the purposes of subsection (a):

"Heavy fuel oil" includes petroleum that is no. 6 technical grades of fuel oil and other grades such as navy special fuel oil and bunker C.

"Release of heavy fuel oil" means a release subject to the federal Oil Pollution Act of 1990.

"Tank barge" means any vessel that carries oil in bulk as cargo or in residue and is not equipped with a means of self propulsion. [L 1996, c 315, §1]

§**128D-7 State contingency plan; rules.** (a) The department shall adopt, by rules, and from time to time update a Hawaii state contingency plan which, as nearly as the department deems appropriate and practicable, shall comport with and complement the National Contingency Plan prepared under the authority of the Clean Water Act and CERCLA. The state contingency plan shall include methods and criteria for evaluating the degree of hazard present at a site with releases of hazardous substances or pollutants or contaminants, including whether the site poses an imminent or substantial hazard, and whether it is a priority site, and whether response actions are feasible and effective. In preparing the plan, the department shall consider and take into account regionally and locally developed contingency plans.

(b) The department shall adopt, by rules, the criteria for the selection and for the priority ranking of sites pursuant to subsection (c) for removal and remedial action under this chapter, and shall adopt criteria for the ranking of sites in order of priority. The criteria shall take into account the pertinent factors relating to the public health and the environment, which shall include, but are not limited to, potential hazards to public health and the environment, the risk of fire or explosion, toxic hazards, the extent to which the deferral of remedial action will result, or is likely to result, in a rapid increase in cost or in a hazard to human health and the environment. The criteria may include a minimum hazard threshold below which sites shall not be listed pursuant to this section.

(c) The department shall publish and revise, at least annually, a listing of the sites subject to this chapter and any de minimis settlements made under this chapter. The sites shall be categorized and placed on one of the following lists:

(1) A list of the sites with releases of hazardous substances for which the department has identified a responsible party, and the responsible party is in compliance, as determined by the department, with an order issued, or an enforceable agreement entered into.

(2) A list of the sites with releases of hazardous substances for which all of the following apply:

(A) The department has not been able to identify a responsible party or the responsible party is not in compliance, as determined by the department, with an order issued or an enforceable agreement entered into;

(B) The nature and extent of the release of hazardous substances at the site have not been adequately characterized by the responsible party or the department.

(d) Funds appropriated to the department for response actions shall be expended in conformance with the priority ranking of sites, as established on the list of sites specified in subsection (c), except that funds appropriated for removal action may be expended without conforming to the priority ranking if any of the following apply:

(1) The funds are necessary to monitor removal actions conducted by private parties at sites listed pursuant to subsection (c)(1);

(2) State funds are necessary for the State's share of a removal or remedial action pursuant to section 104(c)(3) of CERCLA;

(3) The funds are used to assess, evaluate, and characterize the nature and extent of a release of hazardous substances or pollutants or contaminants at sites listed pursuant to this section; or

(4) The director determines that immediate removal action at a facility or site is necessary because there may be an imminent and substantial endangerment to the public health or welfare or the environment.

(e) The criminal penalties set forth in sections 128D-3 and 128D-10 shall not take effect until the state contingency plan has been adopted. Until the state contingency plan is adopted, the national contingency plan, as it exists on the effective date of this chapter, will be considered to be the state contingency plan for purposes of enforcing the remaining sections of this chapter.

(f) The department may adopt such rules, as it deems necessary for the implementation, administration, and enforcement of this chapter, CERCLA, the Clean Water Act, and other pertinent laws. [L 1988, c 148, pt of §2; am L 1990, c 298, pt of §18; am L 1991, c 280, §8]

Note

Effective date of L 1991, c 280 is June 17, 1991.

§**128D-8 Civil penalties.** (a) Any person who is liable for a release, or threat of a release, of hazardous substances, and who fails, without sufficient cause, to properly provide removal or remedial action pursuant to an administrative order issued by the director, may be liable to the department for punitive damages up to three times the amount of any costs incurred by the fund pursuant to this chapter as a result of the failure to perform the actions specified in the order. The director is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 128D-5.

(b) In addition to liability for costs incurred by the State for the investigation, assessment, containment, and removal of a release or a threat of a release of hazardous substances, any person who wilfully, knowingly, or recklessly violates or fails or refuses to comply with any provision of this chapter, or any order issued, or rule adopted under this chapter, shall be subject to a civil penalty not to exceed $50,000 for each separate violation. Each day a violation continues shall constitute a separate violation. The director is authorized to commence a civil action in the appropriate circuit court to recover such penalties.

(c) Any rule issued pursuant to this chapter shall be adopted in accordance with chapter 91.

(d) Civil penalties collected under this chapter shall be paid to the department for deposit into the revolving fund and may be recovered in a civil action in a court of competent jurisdiction where the violation is alleged to have occurred.

(e) In determining the amount of any civil penalty assessed pursuant to this section, the court shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit of savings, if any, resulting from the violation, and such other matters as justice may require. The director may compromise and settle any claim for a penalty pursuant to this chapter. [L 1990, c 298, pt of §17; am L 1991, c 280, §§9, 10]

§**128D-9 Injunctive relief.** The director may institute a civil action in any court of competent jurisdiction for injunctive relief to prevent any violation of this chapter, of any rule adopted pursuant to this chapter, or of any order issued pursuant to this chapter. The court shall grant relief in accordance with the Hawaii rules of civil procedure. [L 1990, c 298, pt of §17]

§**128D-10 Knowing releases.** Any person who knowingly releases a hazardous substance into the environment in an amount above the reportable quantity established in the rules (other than a permitted release pursuant to and in accord with a federal, state, or county permit), shall be subject to prosecution for a class C felony or shall be punished by a civil penalty of not more than $100,000 per day of violation. [L 1990, c 298, pt of §17; am L 1991, c 280, §11]

§**128D-11 Record keeping requirements.** No person, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any investigative action or request made under this chapter, or any enforcement action taken under this chapter, shall remove from any place, conceal, withhold, destroy, mutilate, alter, or by any other means falsify any record, report, or information that is the subject of or who has reason to believe that they may be the subject of any investigative action or request under section 128D-4(a) and (b). [L 1990, c 298, pt of §17; am L 1991, c 280, §12]

§**128D-12 Confidentiality of information.** (a) Any record, report, or information obtained from any persons under section 128D-4(a) and (b) shall be available to the public, except as provided in subsection (b).

(b) Upon a showing satisfactory to the department that public disclosure of records, reports, or information, or a particular part thereof, obtained by the department, its personnel or contractors pursuant to this chapter, would divulge commercial or financial information entitled to protection under state or federal law, the department shall consider such information to be confidential and not a public record open to disclosure.

(c) No records, reports, or information for which confidentiality is claimed by the person from whom they are obtained shall be disclosed until such person has received reasonable notice under the procedures set forth in 40 Code of Federal Regulations Part 2, Section 2.201 et seq. And has had the opportunity to demonstrate why these should not be disclosed, including a reasonable opportunity to obtain judicial relief. In any such proceeding, confidentiality shall be accorded to any documents which satisfy

the criteria set forth in 40 Code of Federal Regulations Part 2 or any rules adopted by the department.

(d) No confidential information, obtained pursuant to this chapter by any official or employee of the department within the scope and cause of this official's or employee's employment in the prevention, control, or cleanup of releases of hazardous substances or pollutants or contaminants into the environment, shall be disclosed by the official or employee with the following exception: the document or information may be disclosed to officers, employees, or authorized representatives of the State or of the United States, including local government entities, who have been charged with carrying out this chapter, including a cost recovery or an enforcement action, or to comply with any state law, CERCLA, or the Clean Water Act, or when relevant in any proceeding under this chapter. Persons receiving information pursuant to this subsection shall maintain the confidentiality of the information which is provided in this section to the maximum extent allowed by law. [L 1990, c 298, pt of §17; am L 1991, c 280, §13]

§**128D-13 Reporting requirements.** The department shall submit to the legislature an annual report, including a comprehensive budget to implement remedial action plans requiring funding by the environmental response revolving fund. This report shall identify those sites eligible for remedial action under CERCLA, including a statement as to any appropriation that may be necessary to pay the State's share of the plan. [L 1990, c 298, pt of §17]

§**128D-14 Public participation.** Public participation activities may be implemented by the department and required of responsible parties, in accordance with the state contingency plan, or any other state rule. [L 1990, c 298, pt of §17]

§**128D-15 Employee protection.** No person shall terminate from employment or in any other way discriminate against, or cause to be eliminated from employment or discriminated against, any person on the grounds that the person has provided information to the State, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of this chapter, or has refused to act because of the good faith belief that one would be acting in violation of this chapter. No criminal penalty shall be imposed under this chapter upon any person for action taken in the course and scope of his or her employment if the person does not possess managerial or supervisory authority. [L 1990, c 298, pt of §17; am L 1991, c 280, §14]

§**128D-16 REPEALED.** L 1991, c 280, §16.

§**128D-17 Judicial review.** (a) Any person who receives and complies with the terms of any order issued under this chapter may bring and maintain an action in the circuit court to review the order as provided for in this section, prior to the completion of all action required in this order, provided that the person shall not seek any form of injunctive relief and at all times is in compliance with the order.

(b) The director's order may be issued without a hearing and shall be supported by an administrative record consisting of the documents and other papers and materials considered by the director in issuing the order. The order shall be effective immediately

unless it provides otherwise. The person receiving the order may supplement the administrative record with other documents, writings, or material within thirty days after receipt of the order. In the sole discretion of the director, the administrative record may be supplemented further by a proceeding in which testimony and other evidence may be received. A person aggrieved by the order who is and continues to be in compliance with the order may petition the circuit court for an expedited review of the order after service of a certified copy of the order. The review by the court shall be confined to the administrative record. The court shall, upon request by any party, hear oral arguments and receive written briefs. Discovery shall not be permitted. The court shall affirm the order or, if it finds that the order is arbitrary and capricious, it shall reverse or modify the order. The court's order in any expedited review shall be without prejudice to any party in any other proceeding.

(c) In an expedited review of the director's order concerning the determination that the aggrieved party is subject to liability under this chapter, the court shall affirm the order unless it is clearly shown to be arbitrary and capricious.

(d) If the court reverses the director's determination that the objecting party is subject to liability under this chapter, the court shall vacate the order of the director in its entirety and award the objecting party reimbursement from the fund, or if sufficient funds are not available, then from the State, of all costs incurred in complying with the order, which may include the party's reasonable attorney's fees.

(e) In reviewing a director's order under this section, the court shall uphold the director's decision on technical issues, including the nature and scope of the action ordered, unless the objecting party demonstrates, based on the administrative record, that the decision is arbitrary and capricious.

(f) If the court finds that the director's order is arbitrary and capricious under subsection (e), the court shall issue findings of fact and conclusions of law sufficient to advise the parties of the deficiencies in the order. The court shall thereafter allow the contesting parties a thirty-day period following the entry of its findings of fact and conclusions of law to agree to mutually acceptable technical modifications to the challenged order. However, if the contesting parties are unable to reach agreement within the thirty-day period, then the parties shall notify the court and each party shall select a technical panel member in accordance with subsection (g) at the conclusion of the thirty-day period. The court shall order that the outstanding issues be submitted to a technical panel for binding resolution of the issues identified by the court in a manner consistent with the court's findings and conclusions, and the state contingency plan.

(g) The technical panel shall consist of three members, each of whom shall have expertise in engineering, or expertise in the physical, chemical, biological, or health sciences.

(h) A majority of the technical panel members shall determine an appropriate resolution to the technical issues identified by the court in the period of time the court orders. The technical panel members shall be selected as follows:

(1) One member shall be selected by the director;

(2) One member shall be selected by the objecting party, or a majority of the objecting parties challenging the order; and

(3) The foregoing two members shall select the third member of the panel within thirty days of their selection.

(I) After making a decision that resolves the technical issues, the technical panel shall submit its final decision to the court. The court shall vacate the order found

arbitrary and capricious and enter an order adopting the decision submitted by the technical panel unless the court finds that:

(1) The decision is not consistent with the court's findings of fact and conclusions of law and the state contingency plan;

(2) The decision was procured by corruption, fraud, or undue means;

(3) There was evident partiality or corruption in the panel, or any of the members;

(4) The panel was guilty of misconduct by which the rights of any party have been prejudiced; or

(5) The panel exceeded its powers or so imperfectly executed them that a mutual, final, and definite decision upon the subject matter submitted was not made.

(j) Any action for concurrent review under this section shall have priority on the civil trial calendar of the circuit court.

(k) The petitioner, in any action pursuant to section 128D-19, may seek judicial review of any partial or complete denial of the petition. The review shall be conducted pursuant to section 91-14. In addition to any other relief that may be awarded, the court may award to the petitioner reimbursement from the fund, or if there are insufficient funds then from the State, which may include appropriate costs, fees, and other expenses, including reasonable attorney's fees.

(l) In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had the errors not been committed. [L 1990, c 298, pt of §17; am L 1991, c 280, §15]

§**128D-18 Apportionment and contribution.** (a) Liability to the State for any costs or expenditures under this chapter shall be joint and several. Wholly apart from such liability to the State, as between parties who are liable under this chapter, there shall be the rights of apportionment and contribution as provided in this section.

(b) Any party found liable for any costs or expenditures may institute an action for apportionment under this section at any time after receiving an order or after costs or expenditures are incurred by the liable party. Any party found liable for any costs or expenditures may join any other parties that may be liable under section 128D-6 in an action for apportionment.

(c) Any action for apportionment under this section shall be without prejudice to any other action that may be brought by an objecting party under this chapter.

(d) Any party who has incurred removal or remedial action costs in accordance with this chapter may seek contribution or indemnity from any person who is liable pursuant to this chapter. An action to enforce a claim for indemnity or contribution may be brought by any defendant in an action brought pursuant to this chapter or in a separate action after the party seeking contribution or indemnity has paid removal or remedial action costs in accordance with this chapter. In resolving claims for indemnity or contribution, the court may allocate costs among liable parties using those equitable principles which are appropriate.

(e) Any party who receives compensation for response costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation for the same response costs or damages or claims pursuant to any other state or federal law. Any party who receives compensation for response costs or damages or claims

pursuant to any other state or federal law shall be precluded from receiving compensation for the same response costs of damages or claims as provided in this chapter.

(f) Any party found liable for any costs or expenditures under this chapter except under section 128D-5, who establishes by a preponderance of the evidence that only a portion of those costs or expenditures are attributable to that party's actions, shall be required to pay only for that portion. All recoverable costs or expenditures shall be allocated by the court. If any share of the response costs is not paid by a liable party because of insolvency or otherwise, that share shall be assigned to an orphan share. If there is an orphan share, the court shall adjust the allocations of the remaining liable parties so that in addition to paying their allocated shares, they proportionately pay the entire orphan share.

(g) In the process of apportionment of costs among the parties found liable and the establishment of the orphan share, the court shall consider the following criteria:

(1) The volume of hazardous substances transported to the site by each party. For purposes of determining volume, the volume of each transport of a hazardous substance shall be allocated between the arranger for the transport and the transporter of a hazardous substance in apportioning a percentage share of response costs;
(2) The anticipated impact of the hazardous substance and control of the hazardous substance on the cost of response activity at the site;
(3) The degree of care exercised in the disposal or treatment, or both of the hazardous substance by each party that may be liable under section 128D-6;
(4) The manner in which the site was operated and the degree of care exercised by the owner or operator;
(5) The degree of a party's involvement in site operations;
(6) Whether all applicable permits and licenses required by law were obtained and complied with;
(7) The degree to which the party cooperated with federal, state, or local officials to prevent, minimize, respond to, or remedy the release or threat of release; and
(8) Any other aggravating or mitigating factor that the court determines to be relevant.

(h) If the court finds the evidence insufficient to establish each party's portion of the costs or expenditures under subsection (f), the court shall apportion those costs or expenditures, to the extent practicable, according to equitable principles, among the parties.

(l) Any costs or expenditures required by this chapter made by a liable party shall be credited toward the party's apportioned share. Costs shall include reasonable attorney's fees. [L 1991, c 280, pt of §1]

§**128D-19 Administrative review of orders.** (a) Any person who receives and complies with the terms of any order issued under this chapter, within sixty days after completion of the required order, may petition the director to appoint a hearings officer for review of the order and for reimbursement from the fund or the State for the reasonable costs of complying with the order, including interest.

(b) Within thirty days of receipt of the petition, the hearings officer shall commence a contested case hearing in compliance with chapter 91, and, within thirty days of the completion of the hearing, grant in whole or in part, or deny the petition.

(c) In the contested case hearing, in order to obtain reimbursement, the petitioner shall establish by clear and convincing evidence that the petitioner is not liable under this chapter and that the costs for which the petitioner seeks reimbursement are reasonable in light of the action required by the order.

(d) A petitioner who is liable under this chapter may recover the petitioner's reasonable costs of compliance with the order from the fund, or, if there are not sufficient moneys in the fund to satisfy the claims, then from the State, to the extent that the petitioner can demonstrate, on the administrative record, that the director's decision in selecting the action ordered was arbitrary and capricious or was otherwise not in accordance with the law. Reimbursement awarded under this subsection shall include all costs incurred by the petitioner pursuant to the order. If only a portion of the order is found to be arbitrary and capricious or otherwise not in accordance with law, reimbursement awarded under this paragraph shall include all costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with the law.

(e) Reimbursement awarded under subsections (c) and (d) may include appropriate costs, fees, and other expenses, including reasonable attorney's fees. [L 1991, c 280, pt of §1]

§**128D-20 De minimis settlements.** (a) Whenever practicable and in the public interest, the director, in consultation with the attorney general, as promptly as possible, shall reach a final settlement with a potentially responsible party in any administrative or civil action brought under this chapter, provided that the settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the director, the conditions in either paragraph (1) or (2) are met:

(1) Both the amount of the hazardous substances contributed by that party to the facility and the toxic or other hazardous effects of the substances contributed by that party to the facility are minimal in comparison to other hazardous substances at the facility; or

(2) The potentially responsible party is the owner of the real property on or in which the facility is located, and did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility, and did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.

This subsection shall not apply if the potentially responsible party purchases the real property with actual or constructive knowledge that the property was used for the generation, storage, treatment, or disposal of any hazardous substance.

(b) The director may provide a covenant not to sue with respect to the facility concerned to any party who has entered into a settlement under this section unless such a covenant would be inconsistent with the public interest.

(c) The director shall reach any such settlement or grant such covenant not to sue as soon as possible after the director has available the information necessary to reach such a settlement or grant such a covenant.

(d) A settlement under this section shall be entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement. Any state court with jurisdiction may enforce any such consent decree or administrative order.

(e) A party who has resolved its liability to the State under this section shall not be liable for claims for contribution or indemnity regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(f) Nothing in this section shall be construed to affect the authority of the director to reach settlements with other potentially responsible parties. [L 1991, c 280, pt of §1]

§**128D-21 Citizen's suits.** (a) Except as provided in subsections (c) and (d) and in section 128D-17, any person may commence a civil action in the circuit court on the person's own behalf against:

(1) Any person, including the State and any other governmental instrumentality or agency, who is alleged to be in violation of any rule, requirement, or order that has become effective pursuant to this chapter; or

(2) The director, where there is alleged a failure of the director to perform any act or duty under this chapter, that is not discretionary with the director.

(b) The circuit court shall have jurisdiction in actions brought under subsection (a)(1) to enforce the rule, requirement, or order concerned, to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for the violation. The circuit court shall have jurisdiction in actions brought under subsection (a)(2) to order the director to perform the act or duty concerned.

(c) The following shall apply to actions brought pursuant to subsection (a)(1):

(1) No action may be commenced before sixty days after the plaintiff has given notice in accordance with rules adopted under chapter 91 of the violation to:

(A) The director; and

(B) Any alleged violator of the rule, requirement, or order concerned; and

(2) No action may be commenced if the director has issued a notice letter to the violator concerning the violation or has undertaken a response action, including investigation, with respect to the violation.

(d) No action may be commenced under subsection (a)(2) before the sixtieth day following the date on which the plaintiff gives notice to the director that the plaintiff will commence the action. Notice under this subsection shall be given in such manner as the director shall adopt by rule.

(e) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate.

(f) The State, if not a party to any action under this section, may intervene as a matter of right.

(g) This chapter does not affect or otherwise impair the rights of any person under federal, state, or common law, except with respect to the timing of review as provided in section 128D-17.

(h) No action shall be brought under this section for two years following June 17, 1991. [L 1991, c 280, pt of §1]

Revision Note

"June 17, 1991" substituted for "the effective date of this Act".

§**128D-22 Exemption from duplicative regulation.** When there has been a response to a release pursuant to an order issued under federal law, the director may use this chapter to address the same release provided that:

(1) The release creates an imminent and substantial harm to the public health or welfare; and

(2) The federal law has not provided a remedy consistent with the state contingency plan.

In those circumstances, the director shall avoid actions in conflict with federal law. A single release may be addressed either by CERCLA or by this chapter, but not both, except in the case of a joint enforcement. Nothing in this chapter shall prevent the director from taking action pursuant to the common law or other statutory provisions necessary to protect the public health and welfare, safety, or the environment. [L 1991, c 280, pt of §1]

§**128D-23 Exemption from state and county permits.** (A) No state or county permit shall be required for the portion of any removal or remedial action conducted entirely on site where such response action is carried out in compliance with this chapter or where such removal or remedial action is in response to a release of a hazardous substance or pollutant or contaminant that occurred in or on the coastal waters of the State and such removal or remedial action is carried out in compliance with this chapter, the National Contingency Plan, or at the direction of a federal or state on-scene coordinator. [L 1991, c 280, pt of §1; am L 1993, c 324, §3]

"PART II. VOLUNTARY RESPONSE PROGRAM."

§128D-31 General. (a) Except as otherwise provided in this part, all requirements of rules adopted pursuant to part I shall apply to voluntary response actions conducted pursuant to this part. All voluntary response actions, where an exemption from liability may be granted by the department, shall follow the public participation requirements of the remedial process as described in rules adopted pursuant to part I. Additionally, the requesting party shall post a sign at the site notifying the public of participation in the voluntary response program and the public's opportunity to comment.

(b) This part shall apply to any person who chooses to conduct a voluntary response action. However, the exemption from liability in section 128D-40 shall only apply to prospective purchasers. [L 1997, c 377, pt of §2]

§128D-32 Definitions. As used in this part, unless the context otherwise requires:

“Prospective Purchaser” means a prospective owner, operator, tenant, developer, lender or any other party who would not otherwise be liable under section 128D-6, prior to conducting a voluntary response action.

“Requesting party” means the person or persons submitting an application to conduct a voluntary response action.

“Voluntary response action” means a response conducted voluntarily by a requesting party. [L 1997, c 377, pt of §2]

§128D-33 Eligibility. (a) This part shall apply to all releases or threats of releases to which the director is authorized to respond under section 128D-4, except:

(1) A site listed or proposed to be listed on the National Priorities List (NPL) pursuant to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA);

(2) Those sites with respect to which an order or other enforcement actions has been issued or entered under CERCLA and is still in effect.

(3) A site where the United States Coast Guard has issued a federal Letter of Interest;

(4) A site that is subject to corrective action under Subtitle C of the Resource Conservation and Recovery Act (RCRA) or chapter 342J;

(5) At the discretion of the director, a site where the director has issued an order or is conducting a response pursuant to an enforceable agreement under this chapter and 342L;

(6) A site that poses an imminent and substantial threat to human health, the environment, or natural resources as determined by the director; and

(7) A site where the director has determined that there is a significant public interest.

(b) The requesting party shall provide the department with written consent from the property owner to conduct the voluntary response action including any restrictions of property rights.

(c) The requesting party must pay a nonrefundable processing fee of $1,000 with each application to be eligible for a voluntary response action. [L 1997, c 377, pt of §2]

§128D-34 Application. (a) For each site at which a requesting party chooses to conduct a voluntary response action, an application and $1,000 nonrefundable processing fee must be submitted.

(b) The department shall review each application in a timely manner and approve or deny the application based upon the requirements in this section and sections 128D-33, 128D-35.

(c) Each application shall include but not be limited to the following information:

(1) The requesting party’s name, mailing address, telephone number, facsimile number, if applicable, or electronic mail address;

(2) The property owners' names, mailing addresses, telephone numbers, facsimile numbers if applicable, or electronic mail addresses;

(3) The property location, mailing address, street or physical location address, latitude and longitude, tax map key numbers, and telephone number for the requesting party;

(4) A Brief description of the site, its operational history, and any known or suspected contamination;
(5) A Listing of any permits obtained by any facility on the property;
(6) A description of the intended scope of work;
(7) A description of any civil, criminal, or administrative actions relative to the environmental matters of the subject property;
(8) A written consent by the property owner supporting the proposed voluntary response action including any restrictions of property rights; and
(9) The signature of the requesting party.

(d) The requesting party shall provide the department with any and all reports and data pertaining to environmental investigations or response actions on the subject property.

(e) Within sixty days after initial approval of the application, the requesting party and the department shall negotiate an agreement for conducting the voluntary response action. The agreement shall contain guarantees of completion, such as letters of credit, personal guarantees, insurance, or similar measures of guarantee. If, after sixty days, an agreement cannot be negotiated in good faith, the department may deny the application.

(f) The department's decision on an application shall be final, with no right of appeal. [L 1997, c 377, pt of §2]

§128D-35 Denial of application. (a) The director may deny an application submitted under section 128D-34. In denying an application the director may consider the following:

(1) The nature and extent of any past, current, or future actions by the department regarding the proposed site and the impact the voluntary response action might have on these past, current, or future actions;
(2) Site eligibility based on the criteria in section 128D-33;
(3) Completeness and accurateness of the application:
  (A) If an application is denied because it is incomplete or inaccurate, the director, not later than forty-five days after receipt of the application, shall identify the omission or inaccuracy for the requesting party. A requesting party whose application has been denied because it is incomplete or inaccurate, may resubmit an application for the same response action without submitting an additional application fee; and
  (B) If a requesting party's application is denied a second time, the director may require an additional $1,000 processing fee for any subsequent submittal;
(4) Inappropriate or inadequate scope of work;
(5) Pending litigation;
(6) The capacity of the requesting party or the requesting party’s agent to carry out the response action properly;
(7) Whether the public will receive substantial benefit from the cleanup, including but not limited to environmental improvement and economic development;

(8) Whether the continued operation of the site or new site development, with the exercise of due care, will aggravate or contribute to the existing contamination or interfere with the department's response action;
(9) Whether the continued operation or new development of the property will pose health risks to the community and those persons likely to be present at the site; or
(10) The financial viability of the prospective purchaser.
(b) If the director finally denies the application, the director shall:
(1) Notify the requesting party that the application has been denied; and
(2) Explain the reasons for denial of the application. [L 1997, c 377, pt of §2]

§128D-36 Funding. (a) The department shall establish an account, to be called the voluntary response action account, within the environmental response revolving fund pursuant to section 128D-2, for the purpose of administration and oversight of this part.

(b) The $1,000 nonrefundable application fee shall be deposited into the voluntary response action account.

(c) Upon initial approval of an application, the department may require a deposit of up to $5,000 to initiate a site-specific account. The department may require an additional deposit of up to $5,000, whenever the balance of the site-specific account falls below $1,000.

(d) If a site-specific account balance is inadequate to support oversight, the department may discontinue oversight on the voluntary response action. The department may pursue enforcement action against the requesting party and any other person liable under section 128D-6, pursuant to part I of this chapter, when an account balance is inadequate to support further oversight by the department.

(e) At the completion of the voluntary response action, or at the termination of the agreement, the department shall provide a final accounting of the site specific account and return the balance to the requesting party. [L 1997, c 377, pt of §2]

§128D-37 Oversight costs. (a) The department's oversight costs shall be calculated at $100 for each hour of staff time plus actual expenses or one hundred twenty-five per cent of actual cost when contracting for oversight services.

(b) The department shall provide each requesting party or parties a summary of the oversight costs for the party's specific site on an annual basis. [L 1997, c 377, pt of §2]

§128D-38 Exempt positions. There is established such positions as necessary to support the voluntary response program. These positions shall be appointed by the director without regard to chapters 76 and 77. These positions shall be included in any benefit program generally applicable to the officers and employees of the State. [L 1997, c 377, pt of §2]

§128D-39 Letter of completion. (a) Within thirty days of satisfactory completion of the voluntary response action, the director shall issue a letter of completion for the response action completed by the requesting party.

(b) The letter of completion will identify the specific hazardous substances, pollutants, contaminants, media, and land area addressed in the response action.

(c) If contamination is left on the site, the letter of completion shall identify land use restrictions and any required management plan.

(d) The letter of completion shall be noted on the property deed and shall be sent to the county agency that issues building permits. The exemption from future liability and other benefits and restrictions identified in the letter of completion shall run with the land and apply to all future owners of the property. The exemption from liability noted in section 128D-40 shall not apply to those persons who were liable pursuant to section 128D-6 prior to conducting the voluntary response action. [L 1997, c 377, pt of §2]

§128D-40 Exemption from liability. (a) To qualify for an exemption from liability, a requesting party that is also a prospective purchaser shall enter into a voluntary response agreement with the department prior to becoming the legal owner of the property that is the subject of the agreement.

(b) Prospective purchasers who complete a voluntary response action and receive a letter of completion from the department shall be exempt from future liability to the department for those specific hazardous substances, pollutants, contaminants, media, and land area addressed in the voluntary response action. Parties who purchase property from an owner who has completed a voluntary response action and received a letter of completion from the department shall be exempt from future liability to the department for those specific hazardous substances, pollutants, contaminants, media, and land area specified in the letter of completion issued to the party who conducted the voluntary response action.

(c) The exemption from future liability to the department referenced in subsection (b) shall apply only to those specific hazardous substances, pollutants, and contaminants cleaned up to a risk-based standard of not more than one total lifetime cancer risk per one million and only to the specific media and land area addressed in the voluntary response action; provided that the exemption only applies to the contamination which occurred prior to conducting the voluntary response action.

(d) A party who is exempt from future liability to the department under subsections (b) and (c) shall not be liable for claims for contribution or indemnity regarding matters addressed in the voluntary response action.

(e) The department reserves the right to take action consistent with this chapter against responsible parties.

(f) The exemption from liability shall not be effective:

(1) If a letter of completion is acquired by fraud, misrepresentation, or failure to disclose material information; or

(2) Where transactions were made for the purpose of avoiding liability under part I.

(g) There shall be no exemption from liability for other laws or requirements. [L 1997, c 377, pt of §2]

§128D-41 Termination of voluntary response action. (a) An agreement under this part may be terminated by the requesting party at any time.

(b) The director may terminate an agreement pursuant to this section when:

(1) There is an imminent and substantial threat to public health, the environment, or natural resources;

(2) The requesting party is not acting in good faith;

(3) Inadequate funds remain in the site-specific account;

(4) An applicant becomes ineligible after initiating the action pursuant to sections 128D-D and 128D-F;

(5) An applicant fails to comply with the terms of the agreement noted in section 128D-E(e); or

(6) The draft remedial action is inadequate.

(c) Termination of the agreement pursuant to this section does not affect any right the director may have under any law to recover costs or to take enforcement action.

(d) Nothing in this part prohibits the department from taking enforcement action prior to completion of the voluntary response action. Furthermore, the director may, at any time, use the director's authority under section 128D-4 when it is deemed necessary." [L 1997, c 377, pt of §2]